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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 200

NORMAN H. STONE, MARVIN N. STONE, AND JEROME H. STONE, JR., DOING BUSINESS AS J. H. STONE & SONS,

Petitioners.

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY OF PETITIONERS TO BRIEF FOR NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LEWIS F. JACOBSON,
DAVID SILBERT,
Counsel for Petitioners.

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REPLY OF PETITIONERS TO BRIEF FOR NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Board's Brief in Opposition to the Petition for a Writ of Certiorari omits any answer to many important points discussed in the Petition and Supporting Brief, and makes inadequate reference to other points, besides making inaccurate and misleading statements in its sketchy treatment of the "facts."

Although the best reply would be to refer again to the entire Petition and Supporting Brief, we shall attempt to

set forth here some of the points which should be kept in mind upon a reading of the Board's Brief.[1]

1. The Virginia Electric & Power Co. Case.

At page 10 of the Board's Brief in Opposition, the Board makes a weak attempt to meet Petitioners' argument based upon the *Virginia Electric & Power Co.* case, 314 U. S. 469 (see pages 33 to 38 of the Petition and Supporting Brief).

The similarity between the Board's findings in the *Virginia Electric* case and the Board's findings in this case is so strong as to compel the same result reached in the *Virginia Electric* case. The Opinion of this Court in the *Virginia Electric* case shows that the Board specifically found, both as to the bulletin and speeches there involved, that each "interfered with, restrained and coerced the employees in the exercise of the rights guaranteed in Section 7 of the Act."

Exactly the same language appears in the Board's findings in this case as to *each* of the four acts relied upon by the Board: (1) The speech of August 5, 1939 (B.A. 49); (2) The individual contract (B.A. 53, 55); (3) The interviewing of employees (B.A. 56); (4) The letter of May 3, 1940 (B.A. 61). (See also page 37 of the Petition and Supporting Brief where the comparable findings of

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[1] Inasmuch as the only copy of the completed record as assembled by the Clerk was served by petitioners upon the Board, petitioners are unable to give page references to that record. However, as in the Petition and Supporting Brief, references are as follows:

"B.A." refers to Board's Appendix before the Circuit Court of Appeals.

"Rp. A." refers to Respondents' (petitioners here) Appendix before the Circuit Court of Appeals.

the Board in the *Virginia Electric* case and in this case are set forth in parallel columns).

A careful reading of the Board's Findings of Fact in this case and of its findings in the *Virginia Electric* case will defeat any attempt by the Board to distinguish the two cases. If any distinction is to be made, it is that the bulletin and speeches in the *Virginia Electric* case were less entitled to the protection of freedom of speech than the speech, interviews and letter in this case. The Circuit Court of Appeals, in its opinion in this case, found that in the speech, in the interviews, and in the letter of May 3rd, the employees were given an accurate statement of their rights under the Act. (See discussion at pages 5 and 30-31 of the Petition and Supporting Brief.)

2. The Election.

All of the four acts relied upon by the Board: (1) the speech of August 5, 1939, (2) the individual contracts, (3) the interviewing of employees, and (4) the letter to employees, occurred *prior* to the Board election of May 8, 1940, which the Union lost 101 to 59, (pp. 22 to 24 of the Petition and Supporting Brief). The Union filed objections to the election, yet made no complaint at that time of any of these acts. The Board itself overruled the Union's objections and held the election valid. This amounted to a finding by the Board that the employees had exercised their free choice in voting at the election, and that no act of petitioners, as of the date of the election, had interfered with, coerced or restrained the employees in their free choice.

On the doctrine of *res adjudicata,* estoppel, or any similar principle, both the Board and the Union should now be estopped from relying upon any acts which occurred prior to the election.

3. Paragraph 1 (a) of the Decree.

The Board's Brief in Opposition does not answer in any way petitioners' contention with respect to paragraph (1) (a) of the decree, which requires that petitioners: "cease and desist from:

> (1) (a) interrogating their employees as to their union affiliation or activities."

Judge Major, who wrote the opinion of the Circuit Court of Appeals in this case, entered the following notation upon the decree:

> "I do not approve this decree. In my opinion Paragraph (1) (a) should be eliminated."

(See pages 4-5 and 30-31 of the Petition and Supporting Brief).

4. Testimony of All the Employees.

At the hearing before the Trial Examiner, petitioners were ready to call as witnesses each and every one of their employees. The Board's attorney objected to this as cumulative evidence, whereupon it was stipulated that if all of the employees were called their testimony would be substantially the same as the employee witnesses previously called by petitioners (Rp. A. 70-71).

All of the previous employee witnesses had testified to a complete absence of any interference, restraint or coercion. The Board does not have any testimony of any employee upon which it relies. The substance of the testimony of the employee witnesses is set forth in the Petition and Supporting Brief at pages 3, 13, 15, 17, 19-20, 21, 22, 42, 43.

5. The National Licorice Case and Individual Contracts.

At pages 12-13 of the Board's Brief, the Board quotes from the case of *National Licorice Co.* v. *National Labor*

Relations Board, 309 U. S., at 351, to the effect that the individual contracts there involved were

> "found to have been procured in violation of the National Labor Relations Act, *and* to contain provisions violating that Act * * *" (italics ours).

The Board argues that this shows the Court deemed either defect sufficient. However, as shown by italics in the quote above, the word used is "*and*", not "*or*". In other words, the *National Licorice* case holds invalid only contracts which contain provisions violating the Act.

As previously pointed out in our discussion of the *National Licorice* case in the Petition and Supporting Brief (pp. 46-47), the individual contract there involved required employees to renounce several important rights under the Act. In the instant case, except for the adjustment clause, there is no contention by the Board that any provision of the individual contract violated the Act.

As to the Adjustment Clause in the contract, the Board's Brief does not even attempt to answer the arguments contained in the Petition and Supporting Brief, pp. 41-50.

6. The Superior Tanning Case.

The Board's Brief makes repeated references to the case of *Superior Tanning Co.* v. *National Labor Relations Board,* in which this Court denied certiorari and which is entirely beside the point here. In that case, the Circuit Court of Appeals relied upon coercion in the "foisting" of individual contracts on the employees. There were many instances of officials and foremen exerting pressure to drive employees into signing the contracts. As a result, 269 out of 271 employees signed the contracts within a short period of time. That case also involved a discriminatory discharge in violation of Section 8(3) of the Act.

In the instant case, there is no finding or claim of coercion in the execution of individual contracts. In fact, petitioners took great pains to advise the employees that they were entirely free to sign or not sign as they chose. (Petition and Supporting Brief, pp. 15-18.) Forty-seven out of 152 employees did not sign the 1939 contract, and 156 out of 201 did not sign the 1941 contract, yet no employee was ever criticized or discriminated against for not signing, or ever urged to sign. (Petition and Supporting Brief, pp. 15-18.)

It was stipulated that the individual contract was not a term or condition of employment.

There is no complaint in this case, as there was in the *Superior Tanning* case, that any employee was ever discriminated against, laid off or discharged because of union activity or union membership. (Petition and Supporting Brief, p. 13.)

In the *Superior Tanning* case, there was a finding that a speech to employees was "antagonistic toward unions."

7. No Anti-Union Background in This Case.

The Board in its Brief at page 6, in discussing the individual contracts for the years 1940 and 1941, states that employees signing these contracts had no reason to believe petitioners had receded from their "anti-union" policy. Reliance upon "anti-union" policy and background is a stock argument for Labor Board briefs in almost every case, but the Board overlooks that portion of the opinion of the Circuit Court of Appeals which discloses petitioners'

> "background for fair dealing with their employees, union and non-union alike."

(See page 5 of the Petition and Supporting Brief, which quotes other passages from the Circuit Court of Appeals

opinion showing exactly the contrary of an anti-union policy.)

In fact, the letter with which the 1940 individual contract was mailed, expressly told the employees that petitioners did not wish to influence them in the least as to whether or not they should sign the contract. (Petition and Supporting Brief, p. 16.)

Therefore, insofar as the Board predicates its arguments upon a non-existent "anti-union" policy in this case, such arguments must fail.

8. Language of order prohibiting individual contracts in future is too broad and should be modified.

The Board's order prohibits

> "any modification, continuation, extension or renewal [of the contracts] or * * * any similar form of contract with their employees for any period subsequent to the date of this decision."

The Board's Brief, at page 15, states:

> "Read in its context, the challenged provision *forbids only contracts which are subject to the infirmities* which rendered continued enforcement of the 1939, 1940 and 1941 contracts inconsistent with the Act's guarantees. * * * 'Any similar form of contract,' * * * *refers to a contract containing an adjustment clause of the same effect as the illegal one contained in the instant contracts.*" (Italics ours.)

In view of this admission by the Board, and the dangerously broad language of the above provision objected to, this portion of the order should in any event be modified and narrowly limited to contracts containing similar adjustment clauses. Petitioners contend, however, that the adjustment clause is valid.

9. Board's Misstatements.

At page 4 of its Brief, the Board states that at the meeting with employees on August 5, 1939, monitors were selected to act as grievance machinery. This is contrary to the record, which shows that the sole purpose of the monitors on that day in August, 1939, was to arrange vacation schedules for the employees in their respective departments according to seniority and convenience of individual employees; the monitors never acted as representatives for the adjustment of grievances. (Petition and Supporting Brief, pp. 14-15.)

At page 6 of its Brief, the Board states that petitioners' attorney treated the individual contracts as having supplanted the Union's membership application cards. This completely overlooks the Board's own Decision, in Case No. XIII, R. 353, involving the same parties, on April 11, 1940, that the individual contracts were not a bar to collective bargaining. (Petition and Supporting Brief, p. 18.)

Respectfully submitted,

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